

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

NETTISIA MITCHELL,)	
Reg. No. 79698-509,)	
)	
Petitioner,)	
)	
v.)	CASE NO. 2:23-CV-15-RAH-KFP
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

RECOMMENDATION OF THE MAGISTRATE JUDGE

Upon consideration of Petitioner Nettisia Mitchell's pro se Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. 1), the undersigned recommends that it be denied without prejudice for lack of jurisdiction, as set forth below.

Mitchell filed a pro se notice of appeal in the United States Court of Appeals for the Eleventh Circuit on October 19, 2022 (Doc. 277, Case No. 2:21-CR-344-RAH-KFP). The appeal, docketed as Case No. 22-13571-D, remains pending. As long as the appeal is pending, this Court lacks jurisdiction to consider a motion under 28 U.S.C. § 2255. *See, e.g., United States v. Khoury*, 901 F.2d 975, 976 (11th Cir. 1990).¹ Mitchell may re-file a § 2255 motion in this Court following conclusion of her direct appeal.

¹ In *Khoury*, the defendant filed a § 2255 motion after filing a notice of appeal. 901 F.2d at 976. The district court denied the motion on the basis that jurisdiction had vested in the court of appeals. *Id.* The Eleventh Circuit affirmed, noting that "[t]he general rule is that a defendant may not seek collateral relief while his direct appeal is pending." *Id.* (citing *Jones v. United States*, 453 F.2d 351, 352 (5th Cir. 1972)). Mitchell has not presented any extraordinary circumstances warranting deviation from that general rule.

Accordingly, the undersigned Magistrate Judge RECOMMENDS that the motion be DENIED without prejudice.

Further, it is ORDERED that by **February 1, 2023**, the parties may file objections to this Recommendation. The parties must specifically identify the factual findings and legal conclusions in the Recommendation to which objection is made. Frivolous, conclusive, or general objections will not be considered by the Court. The parties are advised that this Recommendation is not a final order and, therefore, is not appealable.

Failure to file written objections to the Magistrate Judge's findings and recommendations in accordance with 28 U.S.C. § 636(b)(1) will bar a party from a de novo determination by the District Court of legal and factual issues covered in the Recommendation and waive the right of the party to challenge on appeal the District Court's order based on unobjected-to factual and legal conclusions accepted or adopted by the District Court except on grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982); 11TH CIR. R. 3-1. *See Stein v. Reynolds Sec., Inc.*, 667 F.2d 33 (11th Cir. 1982); *see also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

Done this 18th day of January, 2023.

/s/ Kelly Fitzgerald Pate
KELLY FITZGERALD PATE
UNITED STATES MAGISTRATE JUDGE